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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re DANIELLE L., a Person Coming
Under the Juvenile Court Law.

BUTTE COUNTY CHILDREN'S SERVICES
DIVISION,

Plaintiff and Respondent,

v.

KENNETH L.,

Defendant and Respondent;

LESTER N.,

Defendant and Appellant.

C040945

(Super. Ct. No. J-29102)

Lester N., the natural father of Danielle L. (the minor), appeals from an order by the juvenile court declaring that Kenneth L. remained the presumed father of the minor.

(Welf. & Inst. Code, § 395.)¹ Lester N. makes several claims of prejudicial error allegedly committed by the juvenile court. We shall affirm.

FACTS AND PROCEDURAL HISTORY

On July 19, 2001, Children's Services Division (CSD) filed an original juvenile dependency petition on behalf of the seven-year-old minor. The petition alleged that the minor had suffered serious physical harm or illness as a result of neglect by her mother. The petition listed both Lester N. and Kenneth L. as alleged fathers of the minor. According to the petition, paternity had not been established.

According to the minor's mother, the birth certificate listed Kenneth L. as the father of the minor, but Lester N. actually was the minor's biological father. The mother was never married to either man. Acknowledging that he was the father of the minor, Lester N. attended the detention hearing. Lester N. was a resident of Missouri.

CSD recommended that no reunification services be offered to Lester N. According to the social worker, Lester N. had not seen the minor since the minor was an infant. On the other hand, Kenneth L. had "maintained a consistent relationship" with the minor since her birth, and the minor called Kenneth L. "her 'daddy.'" Moreover, Kenneth L. visited the minor on a weekly basis.

¹ Further undesignated section references are to the Welfare and Institutions Code.

On August 23, 2001, the juvenile court granted Kenneth L. presumed father status. Thereafter, the court ordered the minor placed with Kenneth L. under a plan of family maintenance. Lester N. was not mentioned in the report prepared by CSD.

On December 12, 2001, CSD filed a petition for modification of previous juvenile court orders. CSD attached to its petition a copy of a November 24, 1993, Sutter County judgment adjudicating Lester N. as the father of the then unborn minor and ordering him to pay child support. CSD asked the court to appoint counsel for Lester N. and conduct a hearing to reconsider its previous findings and orders. Thereafter, the court appointed counsel for Lester N. and scheduled a hearing on the petition for modification.

CSD recommended that the juvenile court grant custody of the minor to Kenneth L. and terminate its jurisdiction over the minor. According to a January 2002 report by the social worker, Kenneth L. "puts [the minor's] needs first and provides appropriate clothing, reasonable discipline and emotional support for her. [The minor] is a happy, outgoing child now and is no longer at risk."

Lester N. told the social worker he had "maintained a relationship with [the minor] throughout her life with letters, emails and gifts." The minor's mother corroborated Lester N.'s statement. According to Lester N., he had contacted CSD on several occasions about the minor's circumstances. Lester N. asked for placement of the minor with him in Missouri.

In written argument, Lester N. claimed that, since the 1993 paternity judgment established him as the father of the minor, Kenneth L. no longer could be considered the minor's presumed father. Therefore, according to Lester N., Kenneth L. was not entitled to custody of the minor. Lester N. requested reunification services or placement of the minor with him.

At the February 7, 2002, hearing on the petition for modification, Lester N. asked for placement of the minor with him. At the continued March 11, 2002, hearing on the petition, the juvenile court ruled that Kenneth L. remained the presumed father, and that his status was not altered by the fact that Lester N. had been adjudicated the biological father of the minor. The court then scheduled a hearing on the recommendation by CSD to dismiss the dependency and grant custody of the minor to Kenneth L.

DISCUSSION

I

Lester N. contends that he is "both the biological and presumed father of this minor" Therefore, according to Lester N., no other man may be determined to be the presumed father of the minor. Lester N. also argues that, as his status as the minor's father has been "irrevocably established, . . . he must be given his paternal rights."

Lester N.'s contention is based on an incorrect factual premise. Contrary to his claim, he is *not* the presumed father of the minor, which he argues is the consequence of the 1993 paternity judgment and his acknowledgment of paternity.

In the dependency system, "[a] 'natural father' can be, but is not necessarily, a 'presumed father' and a 'presumed father' can be, but is not necessarily, a 'natural father.'" (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) A man who is found to be the biological father of a child is the "natural father." However, only a man who has held the child out as his own and received the minor into his home is a "presumed father." (*Ibid.*)

Presumed father status is the most advantageous to a father in the dependency system. Only a presumed father is entitled to reunification services under section 361.5, subdivision (a), and custody of the minor pursuant to section 361.2. (*In re Jerry P., supra*, 95 Cal.App.4th at p. 801.) Presumed fatherhood, for purposes of dependency actions, refers to a situation in which a father comes forward promptly and demonstrates a complete commitment to his parental responsibilities. (*Id.* at pp. 801-802.) It is the burden of the father to prove by a preponderance of the evidence that he is a presumed father. (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585-586.)

In deciding whether a biological father has attained presumed father status, the juvenile court "should consider all factors relevant to that determination. The father's conduct both *before and after* the child's birth must be considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his

circumstances permit." (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849.) "A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child. [Fn. omitted.]" (*Ibid.*)

As we have seen, presumed father status is not the same as natural father status. (*In re Jerry P.*, *supra*, 95 Cal.App.4th at pp. 804-805.) In *Adoption of Kelsey S.*, *supra*, 1 Cal.4th at page 823, footnote 3, our Supreme Court stated, "A man's parentage of a child may be undisputed and legally proven, but he may nevertheless fail to be a 'presumed father'" Such is the case here where, although Lester N. established his paternity, he has not shown he is a presumed father for purposes of the dependency system by virtue of that paternity adjudication.

Relying on *In re Liam L.* (2000) 84 Cal.App.4th 739, Lester N. argues he established presumed father status by acknowledging his paternity of the minor. Lester N. errs. *In re Liam L.* held that a man who executes a written declaration of paternity complying with various requirements of the Family Code qualifies as a presumed father. (*Id.* at p. 746.) In this case, Lester N. has not shown he ever executed any such written statement.

In sum, we conclude the juvenile court properly found that Lester N. was the natural father of the minor, but not also the presumed father under the law. There was no error.

II

Lester N. claims the juvenile court erred prejudicially in failing to question the status of his paternity, as required by section 316.2.

Section 316.2, subdivision (a) requires the juvenile court, at the detention hearing, to "inquire of the mother and any other appropriate person as to the identity and address of all presumed or alleged fathers." The presence at the hearing of a man claiming to be the father does not relieve the court of this duty. The section enumerates specific inquiries for the court to make "as the court deems appropriate."

At the detention hearing in the present matter, all parties knew there was a dispute between Lester N. and Kenneth L. as to the identity of the father of the minor. Assuming he was aware of it, Lester N. could have advised the juvenile court as to the existence of the 1993 paternity judgment. The court had no reason to suspect that further inquiry would have proved fruitful at this juncture. In any event, when the existence of the paternity adjudication became known shortly after the disposition hearing, the court properly appointed counsel for Lester N. and scheduled a hearing on the matter. Thus, even if the court's failure to make each of the inquiries contained in section 316.2, subdivision (a), could be considered error, the record does not show that Lester N. was prejudiced by the delay in learning of the paternity judgment.

"No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of pleading,

. . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Thus, "generally, error involving the infringement of a constitutional right, like any other error, requires a further determination whether the defendant has been prejudiced, and the final test is the 'opinion' of the reviewing court, in the sense of its belief or conviction, as to the effect of the error; and that ordinarily where the result appears just, and it further appears that such result would have been reached if the error had not been committed, a reversal will not be ordered." (*People v. Watson* (1956) 46 Cal.2d 818, 835.)

In this case, Lester N. does not allege that an earlier paternity inquiry would have afforded him an opportunity to develop a relationship with the minor before the hearing that is the subject of this appeal. Moreover, the record would not support such a showing. Instead, it shows that for many years, Lester N. failed to establish a significant relationship with the minor, although presumably he knew he was the minor's father and could have availed himself of the opportunity to have contact with the minor.

In sum, any error by the juvenile court caused no prejudice to Lester N. There was no miscarriage of justice.

III

Lester N. argues that the juvenile court erred in finding him a mere biological father not entitled either to custody

of the minor or to reunification services. According to Lester N., "[t]he court's error here[] was in supposing that [Lester N.] was requesting 'presumed father' status. He wasn't. He already had better than such status (i.e., judicially determined parenthood) granted since 1993, and should have received services and rights"

As we have seen, the predicate of Lester N.'s claim--that as a natural father he is entitled to various rights in the dependency system--is erroneous. Under the dependency statutes, only a presumed father is a "parent" entitled to reunification services and custody. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451.) If it were otherwise, an anonymous sperm donor or a rapist would be entitled to services or custody. (*Ibid.*)

In this case, Lester N. was the biological father of the minor. As such, he *might* be entitled to receive reunification services, but only if the juvenile court determined the minor would benefit from services. (§ 361.5, subd. (a).) From an examination of its ruling in this case on Lester N.'s status, we presume the court implicitly determined that the minor would not benefit from reunification services provided to Lester N. Lester N. does not challenge that determination. There was no error.

IV

Lester N. also claims that the juvenile court prejudicially erred in failing to consider placing the minor in his custody pursuant to section 361.2. According to Lester N., the 1993 paternity judgment rebutted the presumed father status of

Kenneth L. Lester N. suggests he was a "parent" entitled to custody.

It is true, as Lester N. contends, that the juvenile court rejected the proposition that Kenneth L.'s status of presumed father was rebutted by the 1993 paternity judgment. But, contrary to Lester N.'s claim that the court erred, on the record before it the court's decision was correct. It is within the discretion of the juvenile court to determine whether proof that the presumed father is not the biological father should rebut one's status as presumed father. (*In re Kiana A.* (2001) 93 Cal.App.4th 1109, 1118.) In other words, presumed father status is not necessarily rebutted by evidence that another man is the natural father. (*In re Jerry P.*, *supra*, 95 Cal.App.4th at pp. 803-804.)

Lester N. relies on Family Code sections 7611 and 7612 to support his claim. Section 7611 of the Family Code provides that a man is presumed to be the natural father of a child if any of a number of circumstances is true. One of those circumstances is where the man "receives the child into his home and openly holds out the child as his natural child." (Fam. Code, § 7611, subd. (d).)

Family Code section 7612 provides: "(a) Except as provided in Chapter 1 (commencing with Section 7540) and Chapter 3 (commencing with Section 7570) of Part 2 or in Section 20102, a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. [¶]

(b) If two or more presumptions arise under Section 7611 which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. [¶] (c) The presumption under Section 7611 is rebutted by a judgment establishing paternity of the child by another man."

In the dependency context, the term "presumed father" is not an evidentiary phrase but rather "a term of convenience used to identify a preferred class of fathers by reference to the familial bonds described in section 7611 which the Legislature has determined reasonably approximates the class of fathers it wishes to benefit." (*In re Jerry P.*, *supra*, 95 Cal.App.4th at p. 805.)

Here, even had the 1993 paternity judgment rebutted the status of Kenneth L. as presumed father, that judgment conferred no greater rights on Lester N. in the dependency system. As we have seen, in dependency proceedings the natural father has only limited rights. Thus, whether or not Kenneth L. lost his status as presumed father, the status of Lester N. remains the same; he is and remains only the minor's natural father. (Cf. *In re Jerry P.*, *supra*, 95 Cal.App.4th at p. 805.) In order to obtain the rights to services and custody, the father must establish he has received the child into his home and holds out the child as his own. (*In re Emily R.* (2000) 80 Cal.App.4th 1344, 1354; see also *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1654.)

Here, Lester N. has not alleged he has satisfied both criteria for attaining presumed father status. In fact,

Lester N. does not believe he is required to meet those criteria. However, for purposes of seeking entitlement to services and custody under the dependency statutes, a man in Lester N.'s circumstances is required to do so. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 451.) His failure to meet the criteria for presumed father status means Lester N. is not entitled to such benefits in this dependency proceeding. (*Id.* at p. 452.)

DISPOSITION

The judgment is affirmed.

DAVIS, Acting P.J.

We concur:

NICHOLSON, J.

CALLAHAN, J.